No. 48839-6-II

#15-1-00333-21

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

JOHN CARL BAKER,

Appellant.

ON APPEAL FROM THE
SUPERIOR COURT OF THE STATE OF WASHINGTON,
LEWIS COUNTY

The Honorable Richard L. Brosey, Judge

APPELLANT'S SUPPLEMENTAL BRIEF

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A. SUPPLEMENTAL ASSIGNMENT OF ERROR

Appellant's constitutional right to a public trial were violated when the trial court heard unrecorded arguments about an evidentiary issue without conducting the required courtroom closure analysis of State v. Bone-Club, 128 Wn.2d 254, 906 P.2d 325 (1995), and only later placed it on the record, as indicated by the recent Supreme Court decision in State v. Whitlock, __ Wn.2d __, __ P.3d __ (2017 WL 2591499).[1]

B. ISSUE REGARDING SUPPLEMENTAL ASSIGNMENT

Should the Court reverse because automatic reversal applies where there is a violation of the rights to an open, public trial raised on direct appeal and the proceedings below involved several such violations?

C. SUPPLEMENTAL ARGUMENT

APPELLANT'S RIGHTS TO AN OPEN, PUBLIC TRIAL WERE VIOLATED WHEN THE COURT PROCEEDINGS WERE CLOSED WITHOUT THE REQUIRED BONE-CLUB ANALYSIS

Both the state and federal constitutions guarantee the right to a public trial. See Sixth Amend.; Art. 1, §§ 10, 22. Section 10 guarantees that "[j]ustice in all cases shall be administered openly, and without unnecessary delay." Section 22 guarantees that, "[i]n criminal prosecutions the accused shall have the right. . .to have a speedy public trial[.]" And the Sixth Amendment guarantees that, "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public

[1]A copy of the case is attached for the Court's convenience as Appendix A.

trial[.]"

These rights, of course, are not absolute. In Bone-Club, supra, the Supreme Court recognized that there could be a legitimate, legally justified "closure" of a proceeding in certain limited circumstances. 128 Wn.2d at 258-59. It then set forth five criteria which must be weighed on the record by the trial court before any such closure can occur:

> 1. The proponent of closure or sealing must make some showing [of a compelling interest], and where that need is based on a right other than an accused's right to a fair trial, the proponent must show a 'serious and imminent threat' to that right.
>
> 2. Anyone present when the closure motion is made must be given an opportunity to object to the closure.
>
> 3. The proposed method for curtailing open access must be the least restrictive means available for protecting the threatened interests.
>
> 4. The court must weigh the competing interests of the proponent of closure and the public.
>
> 5. The order must be no broader in application or duration than necessary to serve its purpose.

128 Wn.2d at 258-59.

In asking whether the trial court's decision below has violated the rights to public trial, this Court applies de novo review, because it "is a question of law." State v. Sublett, 176 Wn.2d 58, 92, 292 P.3d 715 (2012). First, this Court asks if the proceeding implicates the public trial

right (based on "experience and logic"). Id. If not, there is no issue, but if so, the Court then asks if the proceeding was "closed." State v. Smith, 181 Wn.2d 508, 521, 334 P.3d 1049 (2014). Again, if not, there is no issue, but if so, the Court then asks a third question: whether the closure was justified in light of the important constitutional rights involved. See id.

In this case, applying these standards, this Court should hold that Mr. Baker's state and federal rights to an open, public proceeding were violated by several unreported sidebars below.

First, the right to public trial was violated during the direct examination of Kathy Harmon. During trial, the state had Harmon identify a map in Pe Ell and say it "accurately reflect[s] the roads" involved in the incident she said had occurred on February 10, 2015, starting when he drove by her car in the driveway of the house of her son's friend. RP 111-12. The state was using the map, marked as Exhibit 6, to support the claim that Mr. Baker could have driven down other roads instead of going the way he had gone - and thus was harassing Ms. Harmon. RP 114-15.

Baker's counsel objected that the map appeared to have a bank in the wrong location. RP 115. The court excused the jury, and the parties then discussed whether the map was accurate. RP 115-16. The prosecutor said she and the witness agreed it was wrong. RP 116. The following

then occurred:

> THE WITNESS: I think it's showing the bank on the wrong side of the road.
>
> (Discussion off the record).

RP 116-17. When back on the record, the judge said it had been "a while" since a visit to the area, trying to establish a common landmark. RP 116-18. Ultimately the prosecutor said she would "withdraw the exhibit and come back with another one tomorrow." RP 117-18. Counsel said, "[t]hank you."

Next, however, there was "[d]iscussion off the record." RP 118. Back on the record, the judge said the bailiff had reported that a juror had heard a conversation down in the lobby by security guards "that the defendant was going to plead yesterday and didn't." RP 118. There was some discussion on the record about that issue. RP 488.

Later, during the testimony of Deputy Stephen Heller, with the jury out, the prosecutor moved to have a tape of an interview he did with Baker introduced into evidence. RP 485. Counsel objected to both foundation and authentification, and the court asked for more foundation. RP 485. The parties then discussed how the evidence was created, with the officer saying it was on a specific "card" in his computer, and counsel asked to "voir dire" the witness, then withdrew the objection. RP 487-88.

With the jury back in, the prosecutor resumed questioning Deputy Heller, the prosecutor asked what device he was using, and to identify the SIM card:

> [PROSECUTOR:] What did you do with the SIM card with the recording of the conversation between you and Mr. Baker?
>
> [DEPUTY:] Upon completion of my initial report for this incident, I removed the SIM card from - -
>
> (Discussion off the record).
>
> THE COURT: No, he's not going to have the mike. You are just going to have to listen to what he has to say.

RP 489-90.

This Court should find that these unreported sidebars violated Mr. Baker's state and federal rights to an open, public trial. In 2014, the Supreme Court applied the "experience and logic" test and concluded that the constitutional rights to an open public courtroom did not require that the public is invited to attend "sidebars." Smith, 181 Wn.2d at 508. It reached this conclusion, however, after looking at the history of such proceedings in light of their usual scope. Id. The Court noted that sidebars "have not historically been open to the public," because they usually involve "mundane" issues such as scheduling, "decorum," and housekeeping. Smith, 181 Wn.2d at 510-511. In addition, the Court

found such proceedings do not involve public interest and are done to "avoid disrupting the flow of trial," either on the record or later "promptly memorialized in the record." 181 Wn.2d at 516 n. 10. Further, they often involve legal challenges and rulings so "devoted to legal 'complexities' as to be 'practically a foreign language'" so that public scrutiny was not needed. Id.

In Whitlock, however, the Court recently clarified that not all "sidebars" are the same. See Whitlock, App. A. In that case, the challenged procedure occurred during trial, when the state objected to defense counsel trying to impeach a state's witness based on prior "dealings with the police." Instead of a sidebar, the parties went into chambers without the defendant or a court reporter. Back on the record a few minutes later, defense cross-examination occurred, but counsel did not return to "dealings with the police." After that, another witness testified. Before the lunch recess, after the defendants had been removed from the room, the court and counsel described the in-chambers proceeding.

All the parties seemed to agree with the proceeding. In fact, defense counsel said that the decisions of the court in chambers had "adequately addresse[d] the Defense's'" concerns.

The Whitlock Court addressed the second and third questions first: whether there was a closure and whether it could be deemed "justified."

The Court easily found that having the proceedings in the judge's chambers was a "closure," and that the closure could not be deemed "justified," because no Bone-Club analysis had occurred. Indeed, the Court noted, any closure without a Bone-Club analysis on the record "will almost never be considered justified." Id.

Because proceedings must not be closed "merely for the sake of convenience as a matter of course," the Court found, applying Bone-Club and requiring the "articulation of a compelling interest" in closure is a required step. Whitlock, __ Wn.2d at __ (App. A at 6-7); see also, State v. Frawley, 181 Wn.2d 452, 458-59, 334 P.3d 1022 (2014).

The Whitlock Court also noted the conference was not recorded, nor was it "promptly memorialized," because there were almost 100 pages of transcript between the sidebar and later description of it on the record. Whitlock, __ Wn.2d at __ (App. A at 7-8). The Court concluded that the in-chambers procedure was not, in fact, a "sidebar" under Smith. Citing Smith, it said that sidebars must be limited to their traditional subject area and something which is not so limited will not meet the "sidebar" ruling of Smith. Whitlock, __ Wn.2d at ___ (App. A at 8-9).

In reaching its conclusion, the Whitlock Court rejected the prosecution's claim that the closure was "necessary to avoid publicly exposing [the witness] as a police informant." Id. It also rejected the

argument that the procedure resolved "only legal issues, as opposed to factual ones." Id. The Court dismissed the "legal-factual distinction" as not dispositive, further noting that the case did not involve just "legal" issues:

> [T]he objection argued in chambers in this case was not purely technical or legalistic. It was about a matter easily accessible to the public: informants and their motives to curry favor with authority.

Id., at 8-9. Further, the Court pointed out, "'[f]act patterns'" are factual." Id.

In this case, the court engaged in a closure below when it held the sidebars off the record and did not promptly memorialize them. RP 111-12. Regarding the Sixth Amendment Article 1, § 22discussion of Exhibit 6, notably, the jury was already excused. There was no reason to close the discussion of whether the exhibit the state was trying to use was an accurate representation of the relevant roads. Further, the trial court did not conduct a proper Bone-Club analysis on the record.

The court also did not conduct such analysis on the record before the discussion off the record which appears to have involved the possible issue of a juror overhearing prejudicial information outside the courtroom. RP 118. Again, however, the jury was not in the courtroom at the time, and there would have been no inconvenience caused by keeping the

discussion on the record.

The jury was not out of the courtroom later, during the direct examination of Deputy Heller, when there was a discussion off the record which appears to have been regarding his handling of the SIM card he said included the recording of Baker and the deputy.

This Court should reverse. When there is a courtroom closure without considering the Bone-Club factors, it is structural error, presumed prejudicial. State v. Shearer, 181 Wn.2d 564, 569, 334 P.3d 1078 (2014). Reversal is automatic, as the error is not subject to "harmless error" analysis. Id. Because Mr. Baker's rights to an open public proceeding - and those of the public - were violated, this Court should reverse.

D. CONCLUSION

For the reasons stated herein, this Court should reverse.

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CERTIFICATE OF SERVICE BY EMAIL/MAIL

Under penalty of perjury under the laws of the State of Washington, I hereby certify that I served opposing counsel and appellant as follows: the Lewis County Prosecutor's Office at appeals@lewiscountywa.gov and sara.beigh@lewiscountywa.gov and to John C. Baker/DOC#942288, Coyote Ridge Corrections Center, PO Box 769, Connell, WA 99326.

DATED this 13th day of July 2017.

Respectfully submitted,

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APPENDIX A

396 P.3d 310
Supreme Court of Washington.

STATE of Washington, Petitioner,
v.
Ralph E. WHITLOCK, Respondent.
State of Washington, Petitioner,
v.
David R. Johnson, Respondent.

NO. 93685-4
|
Argued March 16, 2017
|
Filed June 15, 2017

Synopsis

Background: Defendants were convicted in the Superior Court, Asotin County, No. 14-1-00089-0, Scott D. Gallina, J., following bench trial, of first degree burglary and first degree robbery. Defendants appealed. The Court of Appeals, 195 Wash.App. 745, 381 P.3d 1250, reversed and remanded. State filed petition for review, which was granted.

[Holding:] The Supreme Court, Gordon McCloud, J., held that discussion of issue of proper extent of cross-examination of confidential informant in chambers violated right to public trial.

Judgment of Court of Appeals affirmed.

***311** Appeal from Asotin County Superior Court, No. 14-1-00089-0, Honorable Scott D. Gallina.

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Opinion

GORDON McCLOUD, J.

****1** ¶1 In *State v. Smith*, this court held that the constitutional right to an open courtroom did not require trial courts to invite the public to attend sidebars. 181 Wash.2d 508, 334 P.3d 1049 (2014). It defined "[p]roper sidebars" as those occurring at sidebar or its equivalent and involving "mundane issues implicating little public interest." *Id.* at 515-17 & n.10, 334 P.3d 1049 (citing *State v. Wise*, 176 Wash.2d 1, 5, 288 P.3d 1113 (2012)). Typical examples of such mundane issues are scheduling, housekeeping, and decorum.

¶2 In this case, however, the topic of discussion was the proper extent of cross-examination of a confidential informant who was the State's key witness and the location of the discussion was not at sidebar but in the judge's chambers. In fact, the trial court rejected the State's request to address its objection to the scope of cross-examination at sidebar. Instead, the court adjourned the bench trial proceedings, called counsel into chambers, and discussed that critically important and factually complicated issue behind closed doors. The Court of Appeals ruled, in a two to one decision, that this procedure violated the right to an open courtroom and conflicted with *Smith*. *State v. Whitlock*, 195 Wash.App. 745, 749, 755, 381 P.3d 1250 (2016).

¶3 The State sought review, which we granted. *State v. Whitlock*, 187 Wash.2d 1002, 386 P.3d 1080 (2017). We affirm the Court of Appeals and reaffirm our adherence to *Smith*.

FACTS

¶4 Ralph Whitlock and David Johnson were each charged with multiple counts of robbery and burglary, with firearm and deadly weapon enhancements, arising from a single incident.[1] Whitlock and Johnson waived their jury trial right, and the case was tried to the bench.

¶5 The State's theory was that Whitlock and Johnson arrived at the home of an acquaintance, Tonya Routt; that they were armed with a crowbar and a pistol; that they forced another person at the house, Crista Ansel, to show them around so that they could locate valuables to steal; and that Whitlock and Johnson ultimately stole a television, a safe containing money and drugs, and other items.

¶6 The defense did not deny that Whitlock and Johnson were present at the scene of the robbery. Instead, they sought to undermine the credibility of the State's witnesses and pin the robbery on Ansel. In opening statements, for example, counsel for both defendants impugned Ansel's credibility and singled her out as the only witness who would testify that the defendants committed an assault or carried any weapon.[2]

**2 *312 ¶7 There was certainly material for the defense to use in pursuing this theory. The trial testimony of several of the State's witnesses conflicted with statements those witnesses made to law enforcement officers after the robbery. The State attributed these conflicts to intimidation or bribery by Whitlock; the defense attributed the conflicts to either coercion by the police or drug-induced confusion.

¶8 But the defense focused most intensely and consistently on impeaching Ansel. Ansel's lack of credibility was a predominant defense theme throughout trial.

¶9 When Ansel took the stand, she testified that she and six other people were present in the home when the defendants showed up with the crowbar and pistol. She stated that one person at the house immediately began packing to leave with her young daughter, and that another person there was very frightened. Ansel acknowledged that she was not frightened because Whitlock was like a brother to her. But she testified that she led Whitlock around the house, showing him which rooms contained items he was looking for, opening doors for him to prevent him from breaking them down, and asking him not to wake sleeping children. At some point, Ansel testified, Whitlock accidentally struck her in the face with his elbow and apologized. She said that he told her not to do anything stupid and eventually locked her in a bedroom. She also testified that after the robbery, Whitlock's girlfriend threatened her and urged her to leave town.

¶10 On cross-examination, defense counsel asked Ansel if the reason she refrained from calling the police on the night of the robbery was that she had a warrant out for her arrest. Ansel responded that she would not have called the police in any event. Defense counsel then said, “Okay, but you do have dealings with the police, don't you?” Tr. of Proceedings (TP) (Dec. 9, 2014) at 338-39. The State objected. It asked for a sidebar.

¶11 The court called a recess. But it did not hold a sidebar. Instead, despite the fact that this was a bench trial, it called counsel into chambers and met with them there, with no reporter—or defendants—present. The minutes indicate that this recess began at 10:13 a.m. and lasted 10 minutes. Nobody objected.

¶12 When open court proceedings resumed, defense cross-examination continued. But defense counsel did not ask any questions about Ansel's dealings with the police. Ansel then finished testifying, one other witness for the State testified, and the court announced it would take a recess for lunch.

¶13 Just before that recess, the court and counsel placed on the record a description of the in-chambers proceeding. The minutes indicate that this memorialization occurred between 12:04 and 12:09 p.m. The defendants were not present when this record was made; they had already been taken back to jail. The prosecutor explained that he had objected to the defense's line of cross-examination because he viewed it as both irrelevant and an attempt to intimidate Ansel by revealing she was a police informant in front of the defendants. The prosecutor also summarized that the trial court had ruled in the State's favor in chambers: "The Court, uh, agreed with the State in Chambers that, uh, that there was no, uh, material relevance or, uh, towards her credibility on that, on those issues and so the State's interests were, outweighed the, uh, the Defendants' interests in obtaining or, or listening to this testimony." *Id.* at 425. Defense counsel then explained that he had advanced two bases for questioning Ansel on her "relationship with the police": first, to explain why Ansel would talk with one particular detective even though (according to the defense theory) she was "more afraid of the police than she [was] of Mr. Johnson and Mr. Whitlock"; and second, to set the stage for arguing that Whitlock and Johnson would be unlikely to commit a crime in a home where a known police informant was present. *Id.* at 425-26. Defense counsel also explained that two decisions resulting from the in-chambers proceeding had "adequately addresse[d] the Defenses' interests": first, the State promised that it would not question Ansel about her discussions with any particular detective; and second, the court ruled that Whitlock and Johnson could testify about their suspicions that Ansel was an informant. *Id.* at 426. Finally, the court admonished counsel to maintain decorum and show respect and deference ***313** to the bench, and counsel apologized. (This was apparently a reference to an earlier exchange.) *Id.* at 426-27.

****3** ¶14 When court reconvened, the defense presented its case. Johnson testified that he suspected Ansel and some of the other State's witnesses were police informants. Counsel did not question Johnson further about this suspicion, so that testimony was limited to Johnson's single statement. All of the eyewitness defense testimony, including Johnson's, placed Johnson and Whitlock at the scene of the robbery. Johnson testified that he and Whitlock were framed; one other defense witness testified that he saw Johnson and Whitlock at the scene right before the robbery occurred but did not actually see them take any property.

¶15 In closing, the defense argued that Ansel was the real perpetrator of the robbery and repeated the assertion that the State's case rested entirely on the credibility of her testimony. The State responded by pointing out all of the other evidence that corroborated Ansel's account.

¶16 The court convicted Whitlock and Johnson of first degree burglary and first degree robbery, all with firearm enhancements, and sentenced each man to 180 months. Clerk's Papers (CP) (Whitlock) at 1-77; CP (Johnson) at 98-103.

PROCEDURAL HISTORY

¶17 Whitlock and Johnson appealed their convictions on grounds unrelated to the in-chambers proceeding. The Court of Appeals, however, called for supplemental briefing on the public trial issue. *Whitlock*, 195 Wash.App. at 749, 381 P.3d 1250 ("Our review of the briefs and the record resulted in us directing the parties to submit briefing on the obvious but overlooked public trial issue."). [3] The court then held, in a two to one decision, that the in-chambers proceeding

violated the defendants' right to a public trial. It reversed the convictions. *Id.* at 755, 381 P.3d 1250; *see id.* at 756-62, 381 P.3d 1250 (Korsmo, J., dissenting).

¶18 The majority[4] first explained that the closure was not permitted under our decision in *Smith*, which held that "[p]roper sidebars," involving "mundane issues implicating little public interest," do not trigger the public trial right under the experience and logic test. 181 Wash.2d at 515-17, 334 P.3d 1049; *Whitlock*, 195 Wash.App. at 752-53, 381 P.3d 1250. The majority reasoned that *Smith* permits sidebars only when they are (1) " 'limited in content to their traditional subject areas,' " (2) necessary to " 'avoid disrupting the flow of trial,' " and (3) contemporaneously transcribed or " 'promptly memorialized in the record.' " *Whitlock*, 195 Wash.App. at 752-53, 381 P.3d 1250 (emphasis omitted) (quoting *Smith,* 181 Wash.2d at 516 n.10, 334 P.3d 1049). The majority concluded that the in-chambers conference here failed the second and third criteria: it was not necessary to avoid a disruption because the trial was to the bench (so there was no jury to accommodate), and it was neither recorded nor promptly memorialized because there were almost 100 pages of transcripts between the sidebar and the memorialization. *Id.* at 753, 381 P.3d 1250. The majority then applied the ***314** experience and logic test[5] and concluded that the in-chambers proceeding violated the defendants' right to a public trial. *Id.* at 754, 381 P.3d 1250.

****4** ¶19 We granted the State's petition for review. *Whitlock*, 187 Wash.2d 1002, 386 P.3d 1080.

ANALYSIS

[1] **[2]** ¶20 A criminal defendant has a right to a public trial under both the United States Constitution and the Washington State Constitution. *State v. Lormor*, 172 Wash.2d 85, 90-91, 257 P.3d 624 (2011); U.S. CONST. amend. VI; WASH. CONST. art. I, § 22. "The public trial right is found in two sections of the Washington Constitution: article I, section 22, which guarantees a criminal defendant a right to a 'public trial by an impartial jury,' and article I, section 10, which guarantees that '[j]ustice in all cases shall be administered openly.' " *State v. Frawley*, 181 Wash.2d 452, 458-59, 334 P.3d 1022 (2014) (plurality opinion) (alteration in original).

[3] **[4]** ¶21 Whether a defendant's public trial right has been violated is a question of law reviewed de novo. *Wise*, 176 Wash.2d at 9, 288 P.3d 1113 (quoting *State v. Easterling*, 157 Wash.2d 167, 173-74, 137 P.3d 825 (2006)). To answer that question, the court engages in a three-part inquiry: "(1) Does the proceeding at issue implicate the public trial right? (2) If so, was the proceeding closed? And (3) if so, was the closure justified?" *Smith,* 181 Wash.2d at 521, 334 P.3d 1049 (citing *State v. Sublett*, 176 Wash.2d 58, 92, 292 P.3d 715 (2012) (Madsen, C.J., concurring)).

¶22 In this case, the second and third questions are easy to answer. The proceeding at issue in this case was certainly a "closure": the proceeding occurred in the judge's chambers, and that is a private and closed setting. *See Frawley*, 181 Wash.2d at 459-60 & n.8, 334 P.3d 1022 (conducting trial court proceedings in-chambers so that the public is excluded constitutes a closure). And the trial court did not conduct a *Bone-Club* analysis,[6] so the closure was not justified. *Smith*, 181 Wash.2d at 520, 334 P.3d 1049 ("[a] closure unaccompanied by a *Bone-Club* analysis on the record will almost never be considered justified"). *See Frawley*, 181 Wash.2d at 460, 334 P.3d 1022 ("The articulation of a compelling interest [under the *Bone-Club* analysis] ensures that court proceedings are not closed merely for the sake of convenience as a matter of course." (citing *Presley v. Georgia*, 558 U.S. 209, 215, 130 S.Ct. 721, 175 L.Ed. 2d 675 (2010))). We therefore turn to the first question: whether the in-chambers proceeding at issue in this case implicated the public trial right.

****5** **[5]** **[6]** **[7]** ¶23 To determine whether the public trial right attaches to a particular proceeding, we apply the "experience and logic" test. *Smith*, 181 Wash.2d at 511, 334 P.3d 1049 (citing *Sublett*, 176 Wash.2d at 73, 292 P.3d 715). Under the experience prong, we ***315** consider whether the proceeding at issue has historically been open to the public. *In re Det. of Morgan*, 180 Wash.2d 312, 325, 330 P.3d 774 (2014) (citing *Sublett*, 176 Wash.2d at 73, 292 P.3d 715). Under

the logic prong, we ask " ' "whether public access plays a significant positive role in the functioning of the particular process in question." ' " *Id.* at 325-26, 330 P.3d 774 (quoting *Sublett*, 176 Wash.2d at 73, 292 P.3d 715 (quoting *Press-Enter. Co. v. Superior Court*, 478 U.S. 1, 8, 106 S.Ct. 2735, 92 L.Ed. 2d 1 (1986) (*Press II*))). If both prongs are satisfied, the public trial right attaches. *Morgan*, 180 Wash.2d at 325, 330 P.3d 774 (citing *Sublett*, 176 Wash.2d at 73, 292 P.3d 715); *Press II*, 478 U.S. at 9, 106 S.Ct. 2735. The guiding principle is " 'whether openness will "enhance[ ] both the basic fairness of the criminal trial and the appearance of fairness so essential to public confidence in the system." ' " *Smith*, 181 Wash.2d at 514-15, 334 P.3d 1049 (alteration in original) (quoting *Sublett*, 176 Wash.2d at 75, 292 P.3d 715 (quoting *Press-Enter. Co. v. Superior Court*, 464 U.S. 501, 508, 104 S.Ct. 819, 78 L.Ed. 2d 629 (1984) (*Press* I))).

¶24 *Smith* has already answered that question with regard to the proceedings at issue here. In *Smith*, which we decided before the *Whitlock*/*Johnson* trial, we held that sidebars do not implicate the public trial right under the experience and logic test "because [sidebars] have not historically been open to the public and because allowing public access would play no positive role in the proceeding[s]." 181 Wash.2d at 511, 334 P.3d 1049.

¶25 But we limited that holding to *sidebars.* We considered whether sidebar conferences on evidentiary matters held in a hallway outside the courtroom—solely because of the "peculiar layout" of the courthouse making conferences at the bench impractical but with video and audio recording equipping that outside hallway for just such sidebars—implicate the public trial right. *Id.* at 512, 334 P.3d 1049. We ruled that "[p]roper sidebars" do not meet either prong of the experience and logic test and therefore do not implicate the public trial right at all. *Id.* at 516-19 & n.10, 334 P.3d 1049. We defined "[p]roper sidebars" as proceedings that "deal with the mundane issues implicating little public interest[,] ... done only to avoid disrupting the flow of trial, and ... either ... on the record or ... promptly memorialized in the record." *Id.* at 516 & n.10, 334 P.3d 1049 (citing *Wise*, 176 Wash.2d at 5, 288 P.3d 1113). We also held that the particular proceedings at issue in that case—all addressing legal challenges and evidentiary rulings that were so devoted to legal "complexities" as to be "practically a foreign language"—were proper sidebars. *Id.* at 518-19, 334 P.3d 1049; *see id.* at 539-41, 334 P.3d 1049 (Owens, J., dissenting).

¶26 Under *Smith*, the in-chambers proceeding in this case was definitely not a "[p]roper sidebar." *Id.* at 516, 334 P.3d 1049.

[8] ¶27 First, it occurred in chambers. Chambers are, by definition, closed to the public. *Frawley*, 181 Wash.2d at 459-60, 334 P.3d 1022. So the location of the proceeding in this case cannot be considered the location of a sidebar.

¶28 The State implicitly admits this by arguing in this court that such a complete closure was necessary to avoid publicly exposing Ansel as a police informant. Suppl. Br. of Pet'r at 11. That, however, simply proves that this was not a regular sidebar but an intentional courtroom closure to exclude the public.

¶29 Second, the in-chambers proceeding was not recorded or promptly memorialized. The State argues that the in-chambers proceeding was consistent with *Smith* because it was eventually memorialized. But there was no reason for any delay in memorialization at all here. As discussed, this was a bench trial. The entire objection could have been argued on the record at any time with no inconvenience to anyone.

****6** ¶30 Finally, the State argues that the in-chambers proceeding resolved only legal issues, as opposed to factual ones, and was therefore permissible under *Smith*. But *Smith* did not adopt a strict "legal-factual distinction" for determining whether a proceeding implicates the public trial right, 181 Wash.2d at 514, 334 P.3d 1049 (citing *Sublett*, 176 Wash.2d at 73, 292 P.3d 715), much less for determining whether a chambers discussion can be recharacterized as a midtrial ***316** sidebar. Further, the objection argued in chambers in this case was not purely technical or legalistic. It was about a matter easily accessible to the public: informants and their motives to curry favor with authority. As the State itself argued to this court, the issue was "wrapped in a very complicated *fact pattern* that would not be obvious to the trial court without explanation." Suppl. Br. of Pet'r at 11-12 (emphasis added).[7] "Fact patterns" are factual.

¶31 For these reasons, the Court of Appeals properly determined that the in-chambers proceeding at issue in this case was not a "[p]roper sidebar." *Smith,* 181 Wash.2d at 516, 334 P.3d 1049. Following *Smith*, the in-chambers proceeding implicated the defendants' right to a public trial.

CONCLUSION

¶32 The in-chambers proceeding in this case was not a sidebar, constituted a courtroom closure, and occurred without the justification that might be provided by a *Bone-Club* analysis. The Court of Appeals was therefore correct in ruling that this courtroom closure constituted a structural error requiring reversal.

¶33 We therefore affirm.

WE CONCUR:

Fairhurst, C.J.

Johnson, J.

Madsen, J.

Owens, J.

Stephens, J.

González, J.

Wiggins, J.

Yu, J.

All Citations

396 P.3d 310, 2017 WL 2591499

Footnotes

1 Clerk's Papers (CP) (Whitlock) at 60-61; CP (Johnson) at 83-84. Whitlock was also charged with two counts of bribing a witness. CP (Whitlock) at 62-63.

2 This was not an entirely accurate forecast of the testimony. In fact, a witness not present during the robbery testified that she received texts from several victims immediately afterward, stating that a gun was present, Tr. of Proceedings (TP) (Dec. 8, 2014) at 233-34; another witness testified that he saw Johnson leaving the scene of the robbery holding a pistol, TP (Dec. 9, 2014) at 385; and a third witness testified that Ansel told him, at the scene while the robbery was occurring in another room, that the defendants were armed with a crowbar and a gun, TP (Dec. 10, 2014) at 614.

3 The State asserts that the Court of Appeals raised the public trial issue sua sponte. But Whitlock filed a pro se "Statement of Additional Grounds for Review" (Statement), which identified the fact that the in-chambers proceeding had occurred and raised a right-to-presence claim. Statement at 1, *State v. Whitlock*, No. 33073-7-III ("Were the defendant's Constitutionally protected due process rights violated when the trial proceedings were held without his presence?"). In late January 2016, the Court of Appeals rejected that pro se Statement for filing, pursuant to *State v. Romero*, 95 Wash.App. 323, 975 P.2d 564 (1999). Letter from Renee S. Townsley, Clerk/Adm'r, to Ralph Whitlock, Appellant (Jan. 25, 2016) (on file with court). But three months later, the court sent counsel a letter directing them to "provide supplemental briefing on the issue raised by Mr.

Whitlock in his pro se [Statement] that the trial court heard argument and ruled upon an evidentiary objection in chambers and without him present." Letter from Renee S. Townsley, Clerk/Adm'r, to counsel (Apr. 22, 2016) (on file with court). The letter specifically directed counsel to brief both the right to presence and the right to a public trial. *Id.*

4 Judge Pennell joined the majority in full but also wrote a separate concurrence. *Whitlock*, 195 Wash.App. at 755-58, 381 P.3d 1250 (Pennell, J., concurring).

5 This court adopted the experience and logic test in *State v. Sublett*, 176 Wash.2d 58, 72, 292 P.3d 715 (2012) (plurality opinion). The test derives from the United States Supreme Court's decision in *Press-Enterprise Co. v. Superior Court*, which held that a qualified right of public access attaches to proceedings that (1) "have historically been open to the press and general public" and (2) function properly, or better, *because* they are public. 478 U.S. 1, 7-8, 106 S.Ct. 2735, 92 L.E.2d 1 (1986).

6 *State v. Bone-Club*, 128 Wash.2d 254, 258-59, 906 P.2d 325 (1995). Under *Bone-Club*, the trial court may not close the courtroom unless it "perform[s] a weighing test consisting of five criteria":

> "1. The proponent of closure or sealing must make some showing [of a compelling interest], and where that need is based on a right other than an accused's right to a fair trial, the proponent must show a 'serious and imminent threat' to that right."
>
> "2. Anyone present when the closure motion is made must be given an opportunity to object to the closure."
>
> "3. The proposed method for curtailing open access must be the least restrictive means available for protecting the threatened interests."
>
> "4. The court must weigh the competing interests of the proponent of closure and the public."
>
> "5. The order must be no broader in its application or duration than necessary to serve its purpose."

Id. (second alteration in original) (quoting *Allied Daily Newspapers of Wash. v. Eikenberry*, 121 Wash.2d 205, 210-11, 848 P.2d 1258 (1993)).

7 The State also cites precedent holding that a defendant who seeks to compel the disclosure of an informant's identity must make "a compelling showing of necessity to overcome the State's interest" in protecting that information. Suppl. Br. of Pet'r at 12 (citing *Roviaro v. United States*, 353 U.S. 53, 60-61, 77 S.Ct. 623, 1 L.Ed. 2d 639 (1957)). In 1978, this court observed that the proper way for the trial court to balance those interests was to "hold an in camera session at which the judge hears the informer's testimony and applies the *Roviaro* standard." *State v. Harris*, 91 Wash.2d 145, 150, 588 P.2d 720 (1978). Here, the State argues that it would be illogical to allow such in-camera proceedings but disallow the in-chambers proceeding in this case. Suppl. Br. of Pet'r at 12. This argument is unpersuasive because our 1978 *Harris* decision does not address the public trial right at all. It predates *Bone-Club*, in which we articulated the five steps that a trial court must take before closing a proceeding, to which the right to an open courtroom attaches, in a criminal trial.

RUSSELL SELK LAW OFFICE

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